

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 3 O'clock & 58 min P M

Date 6/10/03

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia SB

In the matter of:

WADLEY C. MOODY, JR.
WENDI A. MOODY

Debtors

Chapter 13 Case

Number 00-21214

**ORDER ON TRUSTEE'S OBJECTION TO THE
CLAIM OF WORLD OMNI FINANCE CORPORATION**

On September 20, 2000, Wadley C. Moody and Wendi A. Moody ("Debtors") filed a Chapter 13 case and submitted a plan of reorganization in which they proposed to assume a vehicle lease with creditor World Omni Finance Corporation ("World Omni"). Debtors were to make post-petition monthly lease payments of \$389.75 directly to World Omni, and any pre-petition arrearages were to be paid through the plan. (Lease ¶ 20; Plan & Mot.)

After December 2000, Debtors failed to make post petition payments to World Omni, and on April 5, 2001, World Omni filed a motion for relief from stay. At the confirmation hearing on May 1, 2001, Debtors consented to the granting of that relief. On that same date, I signed both the Order confirming Debtors' plan and the Order granting World Omni's motion. As of the date of confirmation, Debtors had failed to pay four post-

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petition lease payments in an amount totaling \$1,559.00.

World Omni subsequently repossessed the vehicle, disposed of the vehicle by sale, and filed a deficiency claim in the amount of \$11,839.15. Arguing that Debtors had assumed the lease upon filing of their proposed plan and that they subsequently rejected the lease by consenting to relief from stay, World Omni now seeks to have the deficiency claim paid in full as an administrative expense. The Chapter 13 Trustee, who initially objected to allowance of the deficiency claim, now objects only to treating the claim as an administrative expense.

This is a core proceeding under 28 U.S.C. § 157 (b) in which this Court has jurisdiction pursuant to 28 U.S.C. § 1334 (a) and the standing order of reference of the District Court for the Southern District of Georgia issued under authority of 28 U.S.C. § 157 (a). For the reasons discussed below, I conclude that World Omni is entitled to administrative expense priority only in the total amount of the unpaid lease payments that became due and payable between the dates of case filing and plan confirmation.

A trustee may assume or reject an unexpired lease of personal property of the debtor at any time before the confirmation of a plan. 11 U.S.C. § 365 (d) (2). Upon rejection, any damages for breach of that lease, including post-petition damages, are

deemed to have arisen pre-petition and are to be paid through the plan. Id. § 365 (g) (1). Upon assumption, however, the lease is constructively a new agreement entitling the lessor to (1) full cure of any damages that arose prior to filing, id. § 365 (b) (1) (A), and to (2) priority payment as an administrative expense for any damages that arise from the debtor's breach of that new agreement going forward, *see id.* § 365 (g) (2) (A) (providing that rejection following assumption constitutes breach as of time of rejection); id. § 507 (assigning first priority position to administrative expenses); id. § 503 (b) (1) (A) (providing for allowance of "actual, necessary costs and expenses of preserving the estate" as administrative expenses).

There are two ways by which a Chapter 13 debtor may assume an unexpired lease: assumption by formal motion, *see, e.g., S. St. Seaport Ltd. P'ship (In re Burger Boys, Inc.)*, 94 F.3d 755, 763 (2d Cir. 1996), and assumption under a confirmed Chapter 13 plan of reorganization, *see* 11 U.S.C. § 1322 (b) (7). In either event, assumption is subject to court approval. In this case, Debtors proposed to assume the vehicle lease under their Chapter 13 Plan. Their plan, like any bankruptcy plan, was subject to court confirmation, and, as the case progressed, payments were to be made in accordance with the proposed plan and both plan and payments were subject to modification and adjustment if warranted prior to confirmation. Thus, while submitting their proposed plan clearly indicated Debtors' intention to assume the vehicle lease, assumption could not be

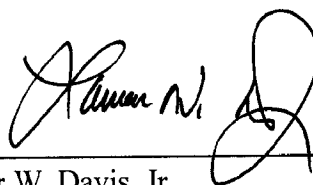
accomplished until this Court confirmed that plan.

On the path to plan confirmation, any number of roadblocks may arise which prompt modification of the plan or preclude confirmation entirely. One potential roadblock in this case was World Omni's motion for relief. If a motion for relief is granted to a lessor prior to confirmation, or if confirmation is contingent upon issuance of relief from stay, then it is axiomatic that the lease between the lessor and the debtor may not be assumed under the plan. Here, I find that Debtors' consent to relief from stay on the same date that their plan was confirmed constituted a rejection of the lease which nullified their prior stated intention to assume the lease, thereby effecting a modification of their plan prior to confirmation.

Therefore, World Omni's deficiency claim is not entitled to payment as an administrative expense except to the extent that Debtors failed to make lease payments to World Omni during the period in which World Omni was constrained by the automatic stay. The total amount of those payments, which were "actual, necessary costs and expenses of preserving [Debtors'] estate," is entitled to priority payment as an administrative expense pursuant to 11 U.S.C. §§ 503 (b) (1) (A) and 507 (a) (1).

ORDER

Pursuant to the above, IT IS THE ORDER OF THIS COURT that \$1,559.00 of the deficiency claim in the total amount of \$11,839.15 of World Omni Financial Corporation shall be paid as an administrative expense and that the balance of that claim shall be paid as a nonpriority unsecured claim.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 16th day of June, 2003.

cc:

Debtor
Debtor's Atty. Henry
Creditor
Creditor's Atty. Block
Trustee Brown SB
U. S. Trustee

6/10/03